Filed 8/6/04 Cohen v. Fabe CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

EVE STERNLIGHT COHEN, as Trustee, etc., Plaintiff and Respondent, v. HELEN STERNLIGHT FABE, as Trustee, etc., Defendant; _____ _ HINJOSA & WALLET, Objector and Appellant.	B162926 (Los Angeles County Super. Ct. No. BP054396)

APPEAL from orders of the Superior Court of Los Angeles County, Thomas W. Stoever, Judge, Ronald H. Hauptman and Enrique Romero, Temporary Judges. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Hinojosa & Wallet, Andrew M. Wallet, and Trudi Sabel, for Objector and Appellant.

Fagelbaum & Heller, Philip Heller, and Jerold Fagelbaum for Plaintiff and Respondent.

I. INTRODUCTION

In this consolidated appeal, the law firm of Hinojosa & Wallet, formerly Hinojosa, Khougaz & Wallet, (the firm) appeals from two orders imposing discovery monetary sanctions jointly and severally against the law firm and its former client, Helen Sternlight Fabe.[1] The firm represented Helen in a dispute over her management of the assets of the Sternlight Family Trust dated December 22, 1986 (the trust) which had been established by Morris and Sara Sternlight, the parents of Helen, Joseph, and Eve. We will affirm the orders under review in their entirety.

II. BACKGROUND

A. Formation of the Trust and Prior Litigation

In 1992, Morris was placed under a Lanterman, Petris, Short Act conservatorship pursuant to Welfare and Institution Code section 5350. A first amendment to the trust was signed on August 5, 1993. The August 5, 1993, amendment provided a procedure to be followed in the event of Morris's inability to act as co-trustee or his death. Under the terms of the August 5, 1993, amendment, in those circumstances, Sara would then serve as co-trustee with Helen and Eve. After Morris died in November 1993, Helen took over the administration of the trust. At the time of Morris's death, he had assets of over $3 million that were supposed to be placed in the trust. It was also believed that Morris had a portfolio of tax free municipal bonds valued at $2 million.

On December 29, 1998, Eve filed a petition to compel Helen, as a co-trustee, to account for trust assets and to return property. The petition also sought to: restrain a

---

[1] Helen, who apparently filed for bankruptcy, has substituted the firm out as counsel in the underlying action. We refer to Helen and other members of the Sternlight family by their first names for clarity and not out of disrespect.

sale; suspend Helen's powers; impose a constructive trust; remove Helen as a co-trustee; and appoint a successor trustee, Sanwa Trust Bank. The December 29, 1998, petition alleged among other things Helen had: used undue influence over Sara to transfer trust property to jointly held assets; failed to provide an accounting; removed and embezzled approximately $1.5 million in trust money to a Swiss bank account; withdrawn approximately $200,000 in trust money for her own personal use; removed jewelry and other valuable personal property belonging from Sara's home; sold Sara's former home and pocketed approximately $460,000; and refused to provide Sara with funds to pay for personal incidentals such as grooming and cosmetics. Helen filed a response and opposition to the petition specifically denying most of its allegations. On January 19, 1999, letters of temporary conservatorship were issued to Joseph over Sara. The Jewish Family Services was subsequently appointed temporary conservator of Sara, who died on April 2, 2000. On March 19, 1999, the Los Angeles County District Attorney's Office served a search warrant on Helen and the trust attorneys, Hoffman, Sabban & Watenmaker. Pursuant to the search warrant, all records regarding the trust and its assets were seized. On September 17, 1999, Helen filed her first account current and report. The report was filed on her behalf by the firm.

B. The Appointment of a Referee

On May 10, 2002, Eve's counsel deposed Kenneth Feinfield.[2] On May 14, 2002, Eve filed a motion to compel Mr. Feinfield to further answer deposition questions.

---

[2] Mr. Feinfield's videotaped deposition is one of several items requested for augmentation by Eve in a motion filed on May 21, 2004. The video tape and deposition transcript were designated to be included in the record on appeal. However, the superior court could not locate the video tape and transcript. They were considered prior to the issuance of certain discovery orders that led to the matters on appeal. Accordingly, the motion to augment the record to include matters related to the Feinfield deposition is granted. (Cal. Rules of Court, rule 12(a)(1)(B).) We also grant Eve's request that the record be augmented to include Helen's May 10, 2002, deposition transcript, which

The motion included a monetary sanctions request against Helen's attorney, Lynard Hinojosa, a named partner in the law firm and Maureen O'Hara, counsel for Mr. Feinfield, for their conduct during the deposition. In opposition to the motion, Mr. Hinojosa filed a declaration which suggested that a referee be appointed to supervise the deposition.

On May 30, 2002, Judge Thomas Stoever conducted a hearing on the motion to compel further answers to deposition interrogatories. Judge Stoever indicated he had viewed the videotape of the deposition. Judge Stoever commented on the "a substantial nastiness" on the videotape. Judge Stoever indicated that he intended to appoint a discovery referee. Eve's counsel objected to appointment of a referee. But Mr. Hinojosa, on behalf of Helen, requested that Judge Stoever appoint a discovery referee. Judge Stoever appointed retired Judge Enrique Romero as the discovery referee, granted the motion to compel further answers, and imposed $2,500 in monetary sanctions on Mr. Hinojosa and Ms. O'Hara. Judge Stoever ordered the parties and any witness to evenly divide the referee's cost.

C. $22,845.64 in Sanctions for Helen's Deposition

On May 10, 2002, Eve's counsel began taking Helen's deposition. Although Helen answered some questions during the deposition, at certain points, she asserted her Fifth Amendment privilege against self-incrimination. Helen's refusal to answer the questions prompted Eve to move to compel further answers. On June 2, 2002, prior to filing the motion, Eve's attorney, Phillip Heller, sent a "meet and confer" letter to

---

provides the basis of the October 25, 2002, monetary sanctions order which was considered by Commissioner Hauptman. Eve has also requested to augment the record to include the order dated April 30, 2004, after trial of the probate action. This latter request is denied. (*People v. Catlin* (2001) 26 Cal.4th 81, 121, fn. 6; *Alberton v. State Bar* (1984) 37 Cal.3d 1, 7, fn. 6.) The request to judicially notice our consolidation order is denied as unnecessary. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 87, fn. 5; *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1087, fn. 1.)

Helen's counsel, Gregory J. Khougaz, at that time a named partner of the firm. Mr. Khougaz did not respond to the letter in writing. On June 12, 2002, Mr. Heller and Mr. Khougaz spoke in person. On June 14, 2002, the two had a telephone conversation. However, Mr. Khougaz said his client's position was unchanged and he would continue to instruct her not to answer. On June 18, 2002, Eve filed a motion to compel further answers and payment of monetary sanctions in the amount of $22,845.64, against Helen and the firm. Eve argued that Helen was improperly asserting the privilege throughout the deposition when either the reasonable possibility of incrimination did not exist or it had been waived. Helen filed opposition to the motion. The opposition was filed two days late.

On July 12, 2002, the referee, retired Judge Romero, issued his report. Retired Judge Romero first recommended the court not consider the late opposition because it had been filed with no explanation for its tardiness. Retired Judge Romero then recommended the court grant and impose sanctions in the amount of $22,845.64 pursuant to Code of Civil Procedure[3] section 2023 as reasonable expenses for the failure of Helen's attorneys to engage in a good faith attempt to resolve the matters raised by the motion to compel further deposition answers. In the alternative, retired Judge Romero recommended the trial court grant the motion to compel in part and impose sanctions for the reasons previously stated.

On July 25, 2002, Helen filed written objections to retired Judge Romero's report and recommendations. Eve responded to Helen's objections. On October 25, 2002, Commissioner Ronald Hauptman: adopted retired Judge Romero's findings and alternate recommendations; ordered further responses to question Nos. 1-7, 9, 14, 16, 18, 20-23; denied the request for further responses to some questions; and imposed $22,845.64 in monetary sanctions against Helen and her attorneys as reasonable expenses for attorney

---

[3] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

fees and costs pursuant to section 2023. A timely notice of appeal was filed from the July 25, 2002, orders.

D. The Referee's Fees

On August 9, 2002, Helen filed a motion to be relieved from paying retired Judge Romero's fees or alternatively to have him paid from trust assets based on her inability to pay them. Eve subsequently requested and obtained an order to show cause re contempt against Helen and Mr. Hinojosa for violating the June 17, 2002, order appointing the referee. Eve also filed opposition to the motion contending Helen had failed to make a sufficient showing of economic hardship. As an alternative, Eve argued counsel representing Helen should be required to pay retired Judge Romero's fees. This was because Helen's counsel's conduct necessitated the appointment of the referee in the first place.

On October 31, 2002, Judge Stoever conducted an evidentiary hearing on Helen's ability to pay retired Judge Romero's fees. At the hearing Helen invoked her Fifth Amendment privilege. As a result, Judge Stoever struck Helen's testimony, declarations, and exhibits. Judge Stoever also denied Helen's motion to be relieved from paying the referee's fees. Judge Stoever then ordered Helen "and/or" her counsel to pay discovery referee fees in the amount of $13,625 constituting the balance incurred as of December 10, 2002. In his written December 10, 2002, order, Judge Stoever ruled: "[I]n response to [Eve's] order to show cause, the court finds that [Helen] and her counsel, Lynard Hinojosa, did not establish adequate justification for their failure to comply with the court's June 17, 2002 Discovery Order appointing a Discovery Referee and allocating the costs of the Discovery Referee among the parties, and if appropriate, witnesses represented by counsel. The court also notes that [Helen] and her counsel previously have been sanctioned three times for discovery abuses in an aggregate amount of $27,845.64 and the appointment of a Discovery Referee, although at the request of

[Helen's] counsel, was based, in part, upon [Helen's] counsel's misconduct at a deposition. Therefore, pursuant to Code of Civil Procedure section 2023[, subdivision] (b)(1) and *Andrews v. Superior Court* (2000) 82 Cal.App.4th 779, the court orders that [Helen] and/or her counsel, the law firm of Hinojosa, Khougaz & Wallet shall on or before December 9, 2002, pay to ADR Services the sum of $13,625, constituting the balance of allocable Discovery Referee fees incurred to date on behalf of [Helen]." Judge Stoever further ordered Helen "and/or her counsel to pay" an additional $5,973 for reasonable expenses and attorney fees incurred in connection with the proceedings for relief from discovery referee fee allocation order pursuant to section 2023, subdivision (b)(1). A timely appeal was filed from that December 10, 2002, order.

III. DISCUSSION

A. Appealability

Eve contends that the discovery orders are not appealable. The law firm correctly argues that because both the October 25 and the December 10, 2002, orders directed payment of sanctions in excess of $5,000, they are directly appealable under section 904.1, subdivisions (a)(11) and (12). (*Rail-Transport Employees Assn. v. Union Pacific Motor Freight* (1996) 46 Cal.App.4th 469, 474-475; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (2003 The Rutter Group) ¶ 2:177.5, p. 2-92.) Moreover, because the law firm no longer represents Helen, the orders were final as to it. (*Rail-Transport Employees Assn. v. Union Pacific Motor Freight*, *supra*, at p. 475, fn. 7; *Barton v. Ahmanson Developments, Inc.* (1993) 17 Cal.App.4th 1358, 1361.)

B. The Firm's Contentions

The firm argues: (1) Judge Stoever erred in imposing monetary sanctions in the October 25, 2002, order because the firm advised its client, Helen, in good faith to assert her privilege against self-incrimination due to a real and imminent threat of criminal prosecution for alleged criminal elder abuse in violation of Penal Code section 368; (2) the $22,845.64 sanction imposed in the October 25, 2002, order was an abuse of discretion; (3) the December 10, 2002, order was issued without due process or a showing of ability to pay the referee fees; and (4) the trial court abused its discretion by imposing the referee fees as a sanction against Helen's attorneys.

C. The October 25, 2002, Discovery Sanction

The firm initially argues Judge Stoever improperly imposed sanctions because Mr. Khougaz had advised Helen to invoke her self-incrimination privilege during the course of a deposition. The firm argues the October 25, 2002, sanctions order was improper because the threat of criminal prosecution of Helen was real and imminent; therefore, Mr. Khougaz could properly advise her to assert a privilege against self-incrimination. We disagree.

The Fifth Amendment to the United States Constitution provides, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." Article I, section 15 of the California Constitution states, "Persons may not . . . be compelled in a criminal cause to be a witness against themselves." The privilege is not limited to answers that would directly support a conviction but extends to those that would furnish a link in the prosecutor's chain of evidence. (*Hoffman v. United States* (1951) 341 U.S. 479, 486-487; *People v. Cudjo* (1993) 6 Cal.4th 585, 617; *In re Marriage of Sachs* (2002) 95 Cal.App.4th 1144, 1151.)

The privileges afforded by the federal and state Constitutions against self-incrimination extend to civil litigants. (*Kastigar v. United States* (1972) 406 U.S. 441, 444; *Segretti v. State Bar* (1976) 15 Cal.3d 878, 886; *Fisher v. Gibson* (2001) 90 Cal.App.4th 275, 285; *Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 305.) Section 2017 provides in pertinent part: "(a) Unless otherwise limited by order of the court in accordance with this article, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." Evidence Code section 940[4] excludes from disclosure information that would tend to incriminate a party. (*Fuller v. Superior Court*, *supra*, 87 Cal.App.4th at p. 305; *Pacers, Inc. v. Superior Court* (1984) 162 Cal.App.3d 686, 688.) Evidence Code section 404 provides, "Whenever the proffered evidence is claimed to be privileged under Section 940, the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege." Thus, a civil litigant has the right to invoke the privilege against self-incrimination in response to deposition questions.

However, an assertion of the self-incrimination privilege is subject to judicial review. The trial court's responsibility in assessing a self-incrimination privilege claims is as follows: '"[A] blanket refusal to testify is unacceptable; a person claiming the Fifth Amendment privilege must do so with specific reference to particular questions asked or other evidence sought. . . . [O]nce this is done, the trial court must undertake a particularized inquiry with respect to each specific claim of privilege to determine

---

4 Evidence Code section 940 provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him."

whether the claimant has . . . establish[ed] that the testimony or other evidence sought might tend to incriminate him.' (*Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1045 citations and italics omitted; accord, *Fisher v. Gibson*[, *supra*,] 90 Cal.App.4th [at p.] 286.)" (*In re Marriage of Sachs, supra,* 95 Cal.App.4th at p. 1151.) Moreover, the privilege against self-incrimination may be waived. (*People v. Barnum* (2003) 29 Cal.4th 1210, 1227, fn. 3; *People v. Stanfill* (1986) 184 Cal.App.3d 577, 581.) Thus, depending on the circumstances, a civil litigant does not have the absolute right to invoke the privilege without any consequences. The party may be required to waive the privilege or accept the consequences of silence by choosing to remain silent. (*Brown v. United States* (1958) 356 U.S. 148, 155-156; *Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 116, overruled on a different point in *People v. Holloway* (2004) 33 Cal.4th 96, 131; *Fuller v. Superior Court*, *supra*, 87 Cal.App.4th at p. 306; *Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712.) This rule acknowledges the competing interests of a person who chooses to exercise constitutional protections against self-incrimination and an opposing party in a civil proceeding who is entitled to a fair and expeditious resolution of its civil claims. (*Fuller v. Superior Court*, *supra*, 87 Cal.App.4th at p. 306.) The court also must factor into this equation its own interests in disposing of civil cases, reducing delay, and efficiently utilizing judicial resources. (Gov. Code, § 68607; *People v. Coleman* (1975) 13 Cal.3d 867, 885; *Fuller v. Superior Court*, *supra*, 87 Cal.App.4th at pp. 306-307; accord *Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 425-426.)

In this case, the issue concerns whether civil monetary penalties were properly assessed against counsel, who has advised a client to assert the privilege. The sanctions were imposed under section 2023 for discovery abuses which provides in part:
"(a) Misuses of the discovery process include, but are not limited to, the following: [¶] . . . [¶] (3) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. [¶] . . . [¶] (5) Making, without substantial justification, an unmeritorous objection to discovery.) [¶] . . . [¶] (8) Making or opposing, unsuccessfully and without substantial

justification, a motion to compel or to limit discovery. [¶] (9) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that such an attempt has been made. Notwithstanding the outcome of the particular discovery motion, the court shall impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct."

Retired Judge Romero's report in which the sanctions were recommended states in part: "[G]iven the fact that [Helen's] counsel did not engage in any good faith attempt to resolve the matters raised by this motion and no evidence that [Helen] or her counsel acted with substantial justification or that there [are] other circumstances that make the imposition of sanctions unjust, the Referee recommends that this Honorable Court award the $22,845.64 requested by [Eve] in her motion as reasonable expenses and attorney's fees and costs incurred in connection with these proceedings, pursuant to . . . section 2023 making it mandatory to impose monetary sanctions under these circumstances." In support of the motion, Eve's attorney, Mr. Heller, filed a declaration which outlined the costs incurred in connection with the proceedings.

Retired Judge Romero outlined in detail the types of questions in which the self-incrimination privilege was asserted. Retired Judge Romero explained his recommendation for the following reasons. Group Nos. 1, 2, and 4 consisted of questions related to the existence or authenticity of documents. Retired Judge Romero recommended further answers be ordered because Helen had previously authenticated the documents in the first account current and report filed on September 19, 1999, and in deposition testimony on May 10, 2002. Group Nos. 3 and 5 related to ownership of bank accounts, which Helen had previously authenticated. Group No. 6 related to questions concerning the sale of Sara's home. Retired Judge Romero noted that although the evidence might tend to incriminate Helen, she waived the privilege by admitting she

received compensation and by answering questions regarding documents relating to the sale. Group Nos. 7 and 24 concerned questions about a 1993 trip to Switzerland. Retired Judge Romero concluded the answers might incriminate Helen but she waived the privilege by answering some questions about the trip, except to certain matters. Group Nos. 9 and 16 related to whether Helen had followed her attorney's instructions concerning the administration of the trust. Helen had previously answered questions indicating that her actions were taken based on instructions from her attorneys. Accordingly, she waived the right to assert the privilege in follow up questions. Group No. 14 concerned the September 19, 1999, first account current and report which had been signed by Helen. Also, Helen had testified that she intended to verify the facts asserted in the report, could not assert any privileges about it. Group No. 18 was about the contents and existence of a safe deposit box. Retired Judge Romero ruled that although they might contain incriminating evidence, Helen waived any privilege by providing the information in a declaration filed in connection with her dissolution action. Group No. 20 concerned a supplement to the first and final report of co-conservators over the person of Morris. Retired Judge Romero concluded Helen waived the right to assert a privilege because she testified that she had signed the supplement. Group No. 21 requested information about the account and checks that had been attached to the first and final report of co-conservators. Retired Judge Romero ruled the information had been attached to the report and Helen had previously answered questions about the documents and account. Group No. 22 concerned advice of counsel about the management of the trust assets and co-conservatorship of Morris and tax advice. Retired Judge Romero concluded Helen had already testified that she was following the advice of counsel. Retired Judge Romero ruled Helen could not assert attorney-client privileges because the claim of privilege had been rejected in a related attorney malpractice action. Group 23 was a question about whether Helen had a discussion with her former attorney about an order, for which no privilege was asserted but for which an objection to the

form of the question was asserted. Retired Judge Romero decided because the form of a question did not support an instruction not to answer, he should compel an answer.

Retired Judge Romero recommended denying the request for further answers concerning the following group of questions. Retired Judge Romero noted Group Nos. 8 and 24 concerned a 1995 trip to Switzerland and the answers could incriminate Helen. She had testified about a 1993 excursion but did not answer any questions about the 1995 trip prior to asserting the privilege. Therefore, Helen's self-incrimination objection was sustained as to this area of inquiry. Group No. 11 asked whether Morris owned property in Israel. Retired Judge Romero ruled Helen could rely on the privilege because her answers could lead to incriminating evidence. Group No. 12 involved questioning of Helen about a durable power of attorney regarding Sara's assets. Retired Judge Romero concluded Helen had not waived any privilege concerning the document which might furnish a link to prosecute her for the conversion of her parents' assets. Group No. 15 asked if Helen had administered to "and/or" obtained prescription drugs for Sara. Retired Judge Romero noted answers to the questions might incriminate Helen who previously testified that the mother was taking certain drugs. But Helen had denied administering the drugs. Group No. 17 related to whether Helen had provided an accounting, which retired Judge Romero ruled could incriminate her for taking millions of dollars from her parents. Helen had not waived the privilege as to these questions. Group No. 19 asked if plaintiff had issued $10,000 to herself and a child without doing the same to her siblings and their children. According to retired Judge Romero, Helen had not waived any privilege related to this information.

Commissioner Hauptman adopted retired Judge Romero's findings and imposed monetary sanctions. The scope of a civil litigant's self-incrimination rights and the determination of whether to impose monetary sanctions are matters within Commissioner Hauptman's discretion. (*Pember v. Superior Court of Kern County* (1967) 66 Cal.2d 601, 604 [discovery sanction]; *Fuller v. Superior Court, supra,* 87 Cal.App.4th at p. 308 [self-incrimination issues].) Commissioner Hauptman's determinations concerning

discovery orders are reviewed for abuse of discretion and will not be set aside unless his rulings exceed the bounds of reason. (*Fuller v. Superior Court, supra,* 87 Cal.App.4th at p. 304; *Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 881; see also *In re Marriage of Sachs, supra,* 95 Cal.App.4th at p. 1150.)

Commissioner Hauptman did not abuse his discretion in imposing monetary sanctions against the firm. Commissioner Hauptman reasonably could conclude the self-incrimination privilege was inapplicable to some of the questions. Further, Commissioner Hauptman reasonably could conclude that in some cases, the privilege had been waived. The firm argues that the waiver finding cannot be upheld in this case because Commissioner Hauptman's ruling was based on retired Judge Romero's findings which did not address the question of whether further inquiries may be incriminating. The firm argues that neither Commissioner Hauptman nor retired Judge Romero considered whether answering additional questions would result in "further incrimination" of Helen under standards set forth in *Rogers v. United States* (1951) 340 U.S. 367, 372-374 and *In re Leavitt* (1959) 174 Cal.App.2d 535, 538. Presumably, the firm is referring to the "reasonable danger of further crimination" language in *Rogers* and "a link in the chain of evidence" metaphor adverted to in *Leavitt*. (*Ibid*.) But, neither the opposition to the motion to compel further answers nor the objections to retired Judge Romero's report raised the issue of whether a finding of waiver was improper because the answers might further incriminate Helen. No evidentiary showing of any kind was made in terms of Helen's further incrimination theory. At no time did the firm argue a waiver finding was erroneous because Commissioner Hauptman was required to make additional findings that Helen might "further incriminate" herself even though she had waived the privilege regarding some of the questions. Eve has correctly argued that because the issue of "further incrimination" was not raised before retired Judge Romero or Commissioner Hauptman, it is not properly before us. (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316; *In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002; *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.)

Moreover, Commissioner Hauptman, without abusing discretion, could conclude Mr. Khougaz by refusing to respond to Mr. Heller's June 2, 2002, attempt to informally resolve the matter thereby causing a lengthy and detailed motion be litigated. The refusal to meet and confer is a misuse of discovery, which is subject to monetary sanctions under section 2023, subdivision (a)(9). (*Leko v. Cornerstone Bldg. Inspection Service* (2001) 86 Cal.App.4th 1109, 1123-1124; *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 435.) No abuse of discretion occurred in imposing monetary sanctions for Mr. Khougaz's conduct in advising Helen to assert a blanket privilege and then refusing to respond to Mr. Heller's June 22, 2002, letter.

For that reason, we disagree with the firm's claim that the amount of the award, $22,845.64, was excessive. The attorney fees and costs claims were documented by declaratory evidence. No documentary evidence was offered to rebut the time spent for the preparation of the motion to obtain the orders to answer and monetary sanctions. We cannot conclude Commissioner Hauptman was clearly wrong in accepting the written and documentary evidence of the fees and costs for time spent in association with the discovery dispute. (*Olson v. Cohen* (2003) 106 Cal.App.4th 1209, 1217; *McFarland v. City of Sausalito* (1990) 218 Cal.App.3d 909, 913.)

D. The Referee's Fees

As noted above, the order directing the firm to pay retired Judge Romero's fees was made following the very contentious and aborted deposition of Mr. Feinfield. Eve filed a motion including a request for the imposition of monetary sanctions on Helen's counsel, Mr. Hinojosa, a named partner in the firm, and Ms. O'Hara, an attorney, who represented Mr. Feinfield. In opposition to the motion, Mr. Hinojosa filed a declaration which suggested that a referee be appointed to supervise the deposition. Judge Stoever conducted a hearing on the motion to compel indicating that he had viewed the videotape and observed "a substantial nastiness" on the tape. Judge Stoever indicated that he

intended to appoint a discovery referee. Although Eve objected to appointment of a referee, Mr. Hinojosa, on behalf of Helen, requested that Judge Stoever do so. Judge Stoever appointed retired Judge Romero as the discovery referee, granted the motion to compel further answers, and imposed $2,500 monetary sanctions on Mr. Hinojosa and Ms. O'Hara. Judge Stoever ordered the parties and any witness to evenly divide the cost of the referee. Thereafter, retired Judge Romero presided over several discovery disputes. The parties then became engaged in a dispute over whether Helen was required to pay the referee fees. Helen filed a motion to be relieved from paying the fees based on her financial inability to pay them. Eve filed a request for an order to show cause why Helen or the firm should not be held in contempt for failing to pay the referee fees. In response to the order to show cause, Helen renewed her motion to be relieved from the obligation of paying the referee fees. Helen's evidence supporting the motion for relief was stricken when she asserted her privilege against self-incrimination at a hearing to determine her ability to pay the fees. Judge Stoever ordered Helen "and/or" the firm to pay the referee fees which had been incurred in part because of Mr. Hinojosa's conduct at the Feinfield deposition.

The firm argues Judge Stoever erred in ordering it to pay the share of the discovery referee fees Helen had previously been ordered to pay. The firm argues: Helen was improperly denied the opportunity to establish her inability to pay the referee fees; the fees were imposed against it without due process; and Judge Stoever improperly imposed the fees as sanctions against them. Eve counters the fees were properly imposed against the firm because: the firm's conduct led to the appointment of the referee; the firm requested the appointment of the referee; and the firm utilized the services of the referee. Eve further contends that the trial court could properly award the fees as a sanction for a discovery misuse under section 2023 and the case of *Andrews v. Superior Court* (2000) 82 Cal.App.4th 779, 781-783.

Section 639 provides in part: "(a) When the parties do not consent, the court may, upon the written motion of any party, or of its own motion, appoint a referee . . .

[¶] . . . [¶] (d) All appointments of referees pursuant to this section shall be by written order and shall include the following: . . . [¶] . . . [¶] (6)(A) Either a finding that no party has established an economic inability to pay a pro rata share of the referee's fee or a finding that one or more parties has established an economic inability to pay a pro rata share of the referee's fees and that another party has agreed voluntarily to pay that additional share of the referee's fees. A court shall not appoint a referee at a cost to the parties if neither of these findings is made. [¶] (B) In determining whether a party has established an inability to pay the referee's fees under subparagraph (A), the court shall consider only the ability of the party, not the party's counsel to pay these fees. . . ." Section 645.1, subdivision (b) provides: "When a referee is appointed pursuant to Section 639, at any time after a determination of ability to pay is made as specified in paragraph (6) of subdivision (d) of Section 639, the court may order the parties to pay the fees of referees who are not employees or officers of the court at the time of appointment, as fixed pursuant to Section 1023, in any manner determined by the court to be fair and reasonable, including an apportionment of fees among the parties. For purposes of this section, the term 'parties' does not include parties' counsel."

Sections 639 and 645.1 by their express language authorize the court to order "the parties," but not attorneys, to pay a discovery referee's fees. They specifically preclude consideration of counsel's ability to pay referee fees in the court's order for payment of the fees. These referee statutes clearly do not provide a basis for requiring an attorney to pay reference fees due to a client's inability to pay.

However, Judge Stoever's December 10, 2002, order to the firm to pay the referee fees was not based on Helen's financial circumstances. Judge Stoever found that Helen had failed to establish an inability to pay the referee fees. Rather, Judge Stoever ordered the firm to pay the referee fees based on its conduct in not only requesting but requiring the appointment the referee. Judge Stoever explicitly ordered the referee fees to be paid as a monetary sanction authorized by section 2023, subdivision (b)(1) and pursuant to the case of *Andrews v. Superior Court*, *supra*, 82 Cal.App.4th at pages 781-783. In *Andrews*,

Division Four of this appellate district concluded that a trial court lacked the inherent power and under section 128 to order an attorney to pay his client's share of discovery fees as a sanction. (*Ibid.*) But the author of *Andrews,* our colleague Acting Presiding Justice Norman Epstein, explained: "It is important to point out what the trial court did *not* do in this case: it did not justify its order that . . . counsel pay the fees of the discovery referee on the basis of the Civil Discovery Act of 1986. . . . It may well be that, in a proper case, the burden of such fees could be placed on an erring attorney under the discovery statute. . . ." (*Id*. at p. 782.) Pursuant to section 2023, subdivision (b)(1) and *Andrews*, Commissioner Hauptman acted within the allowable scope of his discretion in requiring the firm to pay the referee fees.

There is no merit to the firm's contention that the referee fees were imposed without due process of law. On October 1, 2002, Eve filed an ex parte application for an order to show cause why Helen and Mr. Hinojosa should not be held in contempt for violation of the court's June 17, 2002, order. The application also requested an order to pay discovery referee fees and additional monetary sanctions pursuant to section 2023. The order to show cause is directed to Helen and Mr. Hinojosa. The court conducted a hearing on the matter prior to imposing the sanctions. No additional procedural requirements were necessary. (*City of Los Angeles v. David* (2003) 538 U.S. 715, 717; *Mathews v. Eldridge* (1976) 424 U.S. 319, 335.)

Furthermore, we disagree that Helen was denied the opportunity to prove she lacked the ability to pay the referee fees. Helen chose to invoke her privilege to remain silent concerning cross-examination on issues related to her ability to pay. Commissioner Hauptman acted within the permissible scope of his discretion when he struck evidence concerning her claim of poverty. Judge Stoever could properly strike the evidence once Helen chose to exercise the privilege to remain silent. (*Shepherd v. Superior Court*, *supra*, 17 Cal.3d at p. 116; *Fuller v. Superior Court*, *supra*, 87 Cal.App.4th at pp. 306-308; *Alvarez v. Sanchez*, *supra*, 158 Cal.App.3d at p. 712.) In any event, Judge Stoever reasonably concluded, even if Helen had not chosen to invoke the privilege, the

poverty claim was not supported by the evidence because her own declaration established she had assets.

IV. DISPOSITION

The orders of October 25, and December 10, 2002, are affirmed. Eve Sternlight Cohen, as the trustee of the Sternlight Family Trust dated December 22, 1986, as amended, is awarded her costs on appeal jointly and severally from the law firm of Hinojosa & Wallet.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J., Concurring.

I concur. It appears that the referee and trial court erred in certain determinations that there was a waiver of the right to invoke the right against self incrimination. In some instances, the referee and the trial court concluded that the witness had waived her self incrimination rights by filings in other proceedings or matters. "A waiver is effective only in the proceeding in which the person testifies." (2 Witkin, Cal. Evidence (4th ed. 2000) Witnesses, § 430, p. 732; see also § 500, p. 808.)

The trial court found other discovery abuses, and therefore I do not conclude that it abused its discretion in making the discovery orders and imposing sanctions. The amount of the sanctions was based on the time the plaintiffs incurred in connection with the discovery dispute. There is no indication that the time and expense would have been reduced had the objections to the questions to which I refer been sustained.

I also have concerns about imposing on an attorney the costs of a court-appointed referee. The cost of a referee is to be borne by the parties. (Code Civ. Proc., § 645.1, subd. (b).) The referee was appointed at the instigation of appellant because of the discovery disputes, and the appointment was made over the objection of respondent. There is no indication that the trial court complied with Code of Civil Procedure section 639, subdivision (d)(6)(A).

Requiring the attorney to pay the costs of a referee as a sanction may leave the impression that the sanction was a result of trying to insure that the referee is fully paid rather than being a fair evaluation of what should be an appropriate sanction. I do not say that is the situation here and, again, conclude that there was not an abuse of discretion.

MOSK, J.